TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 150.

THE NATIONAL STEAMSHIP COMPANY (LIMITED),
PLAINTIFF IN ERROR,

vs.

CHARLES H. TUGMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 4, 1888.

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INDEX.

	Original.	Print.
Transcript from State court	1	1
Summons	1	1
Complaint	2	1
Order to show cause on petition for removal	5	2
Petition for removal	6	3
Bond for removal	9	4
Notice of appearance for defendant	12	5
Appearance for defendant	13	6
Order denying petition for removal	14	6
Answer	15	6
Mandate of Supreme Court of the United States	16	7
Clerk's certificate	19	8
Appearance for defendant	20	9
Order for cause to proceed in U. S. circuit court	21	9
Order substituting attorney for plaintiff	22	9
Affidavit of plaintiff	23	10
Order substituting attorney for plaintiff	24	10
Affidavit of plaintiff	25	11
Consent to substitution of plaintiff's attorneys	26	11
Order substituting plaintiff's attorneys	27	12
Minutes of trial, &c.	28	12
Judgment	30	12

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	Original.	Print.
Bill of exceptions	32	13
Affidavit of Adam Gos	33	13
Charles M. Conyers	36	15
Proof of service of copy of judgment	37	15
Letter of McCurdy to Chetwood, October 6, 1884	37	15
Mandate of Supreme Court U. S.	38	16
Judgment on mandate	41	17
Notice of motion for addition to costs	43	18
Affidavit of John Chetwood	44	19
Order granting motion for addition to costs	46	20
Notice as to bill of costs	47	20
Judgment on mandate	48	21
Testimony of Charles H. Tugman	50	21
John Chetwood	65	30
Adam Gos	68	32
Affidavit of Francis W. J. Hurst	70	33
George W. Carhart	73	34
Defendant's request	78	37
Judge's certificate to exceptions	79	37
Writ of error (copy)	80	38
Bond	82	38
Clerk's certificate	86	40
Citation and proof of service of same	87	41

1 N. Y. Supreme Court, Kings County.

CHARLES H. TUGMAN, Pl'ff,
against
THE NATIONAL STEAMSHIP COMPANY, Def'd't. } Summons for Relief.

To the defendant:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, 157 Broadway, in the city of New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated June 23d, 1875.

S. S. ROWLAND,
Pl'ff's Att'y, 155 *and* 157 *B'way.*

2 Supreme Court, Kings County.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

The plaintiff complains of the defendant and alleges for a cause of action:

First. That the defendant is a foreign corporation, having an officer or general manager and a place of business in the city of New York, and authorized to sue and be sued, plead and interplead, in the courts of this State.

Second. That about October 8th, 1874, the defendant, by its duly authorized agent, contracted with Charles H. Tugman, the plaintiff, to carry and safely deliver certain merchandise or freight during the months of December, 1874, and January, 1875, at shipper's option, to wit, one thousand tons from the city of New York to Liverpool, England; that the special rate for such carriage and delivery was agreed between the plaintiff and defendant to be 67½ cents, gold, for each one hundred pounds of freight.

Third. That in pursuance of the said agreement the plaintiff contracted to ship and deliver to Fowler Bros., Henry Millward & Co.,
3 W. & J. Rogan, Coey & Co., Thomas Kent, and others, at Liverpool, two millions sixty-five thousand two hundred and fifty-two pounds, at the rate of eighty-seven cents, gold, for the through carriage for each one hundred pounds, and delivered the said freight to the defendant, and the same was delivered by the defendant to the said consignees in said Liverpool.

Fourth. That by the defendant's contract with the plaintiff they were entitled to receive and collect from said consignees for water car-

riage 27*s.* 6*d.* sterling per ton, or seven thousand nine hundred and forty $\frac{45}{100}$ dollars, in gold coin; but the said defendant wrongfully and fraudulently collected from the said consignees the sum of eleven thousand and nine hundred and sixty-seven $\frac{69}{100}$ dollars in gold coin, and misappropriated and converted to the use of the defendant the sum of four thousand and twenty-seven $\frac{24}{100}$ dollars in gold coin, the property of this plaintiff, which, although the same has been duly demanded of the defendant, yet the defendant refuses to pay over the same.

Fifth. That by reason of said wrongful acts of said defendant and of the premises the plaintiff has been compelled to lay out and expend divers large sums of money and has paid and expended the same, and has been otherwise greatly injured, to his damage in the sum of ten thousand dollars.

Wherefore the plaintiff demands judgment in the sum of ten thousand dollars, with interest from January 31st, 1875, together with the costs of suit.

S. S. ROWLAND,
Pl'ff's Att'y.

4 CITY AND COUNTY OF NEW YORK, *ss:*

Charles H. Tugman, being duly sworn, says that he is the plaintiff in this action; that the foregoing complaint therein is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CHAS. H. TUGMAN.

Sworn to before me June 23d, 1875.

CHAS. G. CRONIN,
Notary Public, N. Y. Co.

5 Supreme Court, Kings County.

CHARLES H. TUGMAN, Pl'ff,
against
THE NATIONAL STEAMSHIP COMPANY, Def'd't.

On the petition and bond of the defendant, let the plaintiff show cause before one of the justices of this court, at chambers thereof, at the court-house, in the city of Brooklyn, on the 19th day of July instant, at 11 o'clock a. m., why the above action should not be removed into the circuit court of the United States for the eastern district of New York, in the second circuit, for trial, and for such further or other order as to the court shall seem just. Meanwhile and until the hearing and decision of such motion let all proceedings on the part of plaintiff be stayed.

July 14, 1875.

J. W. GILBERT.

Motion adj. to July 21, 1875, 10.30 a. m.

6 N. Y. Supreme Court, Kings County.

CHARLES H. TUGMAN, Pl'ff,
against
THE NATIONAL STEAMSHIP COMPANY, Def't.

To the supreme court of the State of New York:

The petition of The National Steamship Company, the defendant in the above-entitled action, respectfully shows—

That an action has been commenced in the N. Y. supreme court against it by Charles H. Tugman, the above-named plaintiff, to recover, as appears by the complaint in said action, a sum exceeding five hundred dollars, exclusive of costs, for damages alleged to have been sustained by plaintiff by the alleged conversion by the defendant of certain moneys of the plaintiff.

That the plaintiff in said action at its commencement was and ever since has been and now is a citizen of the State of Illinois.

That your petitioner is a corporation created and existing under and by virtue of the laws of the United Kingdoms of Great Britain and Ireland, and has its principal office for the transaction of its business at Liverpool, in said kingdom; that the meeting- of
7 its stockholders and the sessions of its directors are held at Liverpool aforesaid and its records are kept at and the governing power of the petitioner acts and issues its orders from said city of Liverpool. Wherefore your petitioner is advised and avers that it is a citizen of the said United Kingdoms of Great Britain and Ireland and is an alien to the United States; that it has not designated any person or persons residing in any county of this State on whom process may be served under the act of the Legislature of this State of April 10, 1855.

That your petitioner intends duly to enter its appearance as defendant in said action in this court simultaneously with the presenting of this its petition, and herewith offers a bond, with good and sufficient surety, for its entering in the circuit court of the United States for the eastern district of New York, in the second circuit, on the first day of its next session, a copy of the record in said action, and for its paying all costs that may be awarded by the said circuit court if said court shall hold that said action was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in said action if special bail was originally requisite therein.

Wherefore your petitioner prays that said action may be removed for trial into the next circuit court of the United States to be held in and for the eastern district of New York, in the second circuit; that this court will accept the surety therewith offered and
8 proceed no further in said action, and that such further or other order may be made in the premises as may be proper and in conformity with the statute in such case made and provided.

And your petitioner, as in duty bound, will ever pray, &c.

Dated July 13th, 1875.

THE NATIONAL STEAMSHIP CO.,
Per F. W. J. HURST, *Managing Agent.*

CITY AND COUNTY OF NEW YORK, *ss:*

Francis W. J. Hurst, being duly sworn, on his oath says that he is the managing agent in the United States of the National Steamship Company, the petitioner in the foregoing petition named, and that deponent signed the same as such managing agent by the authority of said company; that deponent has read foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters stated therein on information and belief, and as to those matters he believes it to be true.

F. W. J. HURST.

Sworn to before me this July 13, 1875.

ADAM GOS,
Notary Public, N. Y. Co.

9 Know all men by these presents that we, Francis W. J. Hurst, of No. 615 Fifth avenue, New York city, and Walter Hodges, of Edgewater, Richmond county, New York, are held and firmly bound unto Charles H. Tugman in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Charles H. Tugman, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the thirteenth day of July, A. D. eighteen hundred and seventy-five.

Whereas an action has been commenced in the New York supreme court by the said Charles H. Tugman against The National Steamship Company, a foreign corporation created and existing under and by virtue of the laws of the United Kingdoms of Great Britain and Ireland, and the matters in dispute in said action exceed the sum or value of five hundred dollars, exclusive of costs;

And whereas the said The National Steamship Company are about to present their petition, pursuant to the act of Congress in such case made and provided, for the removal of the said action for trial into the next circuit court of the United States to be held in and for the eastern district of New York in the second circuit:

Now, therefore, the condition of the above obligation is such
10 that if the said The National Steamship Company shall, on the first day of its next session, enter in the said circuit court of the United States to be held in and for the eastern district of New York, in the second circuit, after the removal of the said action thereto, a copy of the record in said action of Charles H. Tugman against it, and pay all costs that may be awarded by the said circuit court if the said court shall hold that said action was wrongfully or improperly removed thereto, and also shall then and there appear in said cause in the said circuit court and enter special bail in the said cause, if special bail was originally requisite therein,

then the above obligation shall be void; otherwise the same shall be and remain in full force and virtue.

F. W. J. HURST.
WALTER HODGES.

Sealed and delivered in presence of—
ADAM GOS.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Francis W. J. Hurst and Walter Hodges, being duly sworn, on his oath says, each for himself, that he is a resident and householder within the State of New York, and is worth the sum of two thousand dollars over and above all his debts and liabilities and property exempt by law from execution, and that he is one of the sureties named in and who executed the foregoing bond.

F. W. J. HURST.
WALTER HODGES.

Sworn to before me this July 13, 1875.

ADAM GOS,
Notary Public, N. Y. Co.

11 STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 13th day of July, A. D. 1875, before me personally appeared F. W. J. Hurst and Walter Hodges, to me known to be the same individuals described in and who executed the foregoing bond, who severally acknowledged that they executed the same.

ADAM GOS,
Notary Public, N. Y. Co.

12 N. Y. Supreme Court, Kings County.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

Please take notice that I am retained by and appear as attorney for the above defendant in this action, and demand that all papers therein be served on me at my office, No. 74 Broadway, in the city of New York.

Dated July 21, 1875.

Y'rs, JOHN CHETWOOD,
Att'y — Def't.

To S. S. Rowland, Esq., att'y — pl'ff.

Service of a copy of within notice admitted July 21, 1875.

S. S. ROWLAND,
Att'y — Pl'ff.

13 Supreme Court, Kings County.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

SIR: Please enter my appearance as attorney for the defendant in above action.

Dated July 21, 1875.

Y'rs, &c.,

JOHN CHETWOOD,
Att'y — Def't, 74 B'way, N. Y.

To George G. Herman, Esq., county clerk.

14 At a special term of the supreme court, held at Brooklyn, Kings county, July 21st, 1875.

Present: Hon. C. E. Pratt, justice.

Supreme Court.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

This cause being before me on July 21, 1875, on an order to show cause, upon the application of the defendant to remove the said cause into the United States circuit court for trial, upon the petition of F. W. J. Hurst, managing agent of the defendant, and after hearing John Chetwood, counsel for the defendant, in favor of the motion, and S. S. Rowland, counsel for the plaintiff, in opposition to the said motion, it is ordered that the said motion be denied, with ten dollars' costs, to be paid to plaintiff's attorney.

Dated July 21st, 1875.

15 Supreme Court.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

The defendant hereby answers the plaintiff's complaint:

They admit their incorporation, and that they have a place of business in the city of New York and a managing agent therein, and they deny generally and specifically each and every material allegation of plaintiff's complaint not herein expressly admitted, and pray that the same may be dismissed with costs.

JOHN CHETWOOD,
Def't's Att'y.

CITY AND COUNTY OF NEW YORK, *ss:*

Francis W. J. Hurst, being duly sworn, on his oath says that he is the managing agent in the United States of the defendant; that he has read the foregoing answer and knows the contents thereof; that

the same is true of his own knowledge except as to the matters stated therein on information and belief, and as to those matters he believes it to be true.

F. W. J. HURST.

Sworn to before me this Aug. 3d, 1875.

ADAM GOS,
Notary Public, N. Y. Co.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, being possessed of the record and proceedings upon a remittitur from the court of appeals of the State of New York, Greeting:

Whereas lately, in the supreme court of the State of New York, before you or some of you, in a cause between Charles H. Tugman, plaintiff, and The National Steamship Company, defendant, upon a remittitur from the court of appeals of the State of New York, wherein the judgment of the said supreme court entered in said cause on the 12th day of February, A. D. 1879, is in the following words, viz: "This cause having been brought on upon the remittitur therein sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the defendants from the judgment of this court to the said court of appeals, and that the judgment appealed from had been affirmed with costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals according to law: Now, therefore, on motion of S. S. Rowland, of counsel for the plaintiff, it is ordered and adjudged that the judgment of the said
17 court of appeals be, and the same is hereby, made the judgment of this court, and that the plaintiff have execution against the defendants for the costs when adjusted by the clerk and inserted in this judgment, as well as for the amount adjudged to be recovered in and by the judgment of this court entered on the twenty-seventh day of June, 1877, and the judgment for costs entered February 19, 1878, and that this order or judgment be annexed to the judgment record herein;" as by the inspection of the transcript of the record of the said supreme court which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-two, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of the record, and was argued by counsel:

In consideration whereof it is now ordered and adjudged by this court that the judgment of the said court of appeals and supreme court in this cause be, and the same are hereby, reversed with costs; and that the said defendant, The National Steamship Company, re-

cover against the said plaintiff one hundred and eight dollars and thirty-four cents for its costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same
18 is hereby, remanded to the supreme court of the State of New York, with instruction to accept the bond tendered by the present plaintiff in error for the removal of the cause to the circuit court of the United States for the eastern district of that State, and proceed no further in the cause.

6TH NOVEMBER, 1882.

And the same is hereby remanded to you, the said judges of the said supreme court of the State of New York, in order that such execution and further proceedings may be had in the said cause, in conformity to the judgment and decree of this court above stated, as according to right and justice and the Constitution and laws of the United States ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, first day of March, in the year of our Lord one thousand eight hundred and eighty-four.

Costs of defendant:

Clerk	$88 34
Attorney	20 00
	108 34

Taxed by—

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

19 N. Y. Supreme Court, Kings County.

CHARLES H. TUGMAN, Pl't'ff,
against
THE NATIONAL STEAMSHIP COMPANY, Def'd't.

I, Rodney Thursby, clerk of the supreme court of the State of New York in and for Kings county, do hereby certify that the summons, complaint, order to show cause, petition, bond, order denying motion to remand cause, and answer hereto annexed are true copies of their respective originals and of the whole thereof on file and remaining of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court this 8th day of November, A. D. 1884.

RODNEY THURSBY, *Clerk.*

Endorsed: Copy record. John Chetwood, att'y — def't, 145 B'way, N. Y. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 8th day of November, 1884.

20 U. S. Circuit Court, Eastern District N. Y.

CHARLES H. TUGMAN
vs.
THE NATIONAL STEAMSHIP COMPANY.

You are hereby requested to enter the appearance of the defendant above named herein by me as its attorney.

November 8, 1884.

Y'rs, JOHN CHETWOOD,
Att'y — Def't.

To B. Lincoln Benedict, clerk.

Endorsed: Appearance. Filed November 8, 1884.

21 U. S. Circuit Court, Eastern District N. Y.

CHARLES H. TUGMAN
vs.
THE NATIONAL S. S. COMPANY.

NOVEMBER 8, 1884.

The defendant above named having this day filed in this court a copy of the record in this cause, by which it appears that this cause was originally brought in the New York supreme court, Kings county; that by the mandate of the Supreme Court of the United States the said N. Y. supreme court was directed to accept the petition and bond filed by the defendant in the said State court for the removal of *th* this cause into this court and proceed no further therein;

And the said defendant having this day filed his appearance herein, it is—

Ordered that this cause do now proceed in this court as if it had been commenced herein by original process, and the appearance of the said defendant by John Chetwood, its attorney, is hereby entered.

On motion of—

JOHN CHETWOOD,
Defendant's Attorney.

22 Circuit Court of the United States, Eastern District of New York.

CHARLES H. TUGMAN, Pl'ff,
against
THE NATIONAL STEAMSHIP COMPANY, Def't.

Present: Honorable Charles L. Benedict, district judge, holding the court.

On reading and filing the annexed affidavit of Charles H. Tugman, sworn to the second day of December, 1885, it is hereby ordered and decreed that James R. Carmichel, Esq., attorney and counsellor

at law, of No. 155 Broadway, New York city, be, and hereby is, substituted as attorney or solicitor for plaintiff herein in the place and stead of Freeman J. Fithian, deceased.

Dated the 19th day of March, 1886.

CHAS. L. BENEDICT.

23 Circuit Court of the United States, Eastern District of New York.

CHARLES H. TUGMAN, Pl'ff,
against
THE NATIONAL STEAMSHIP COMPANY, Def't.

STATE OF NEW YORK,
City and County of New York, } ss:

Charles H. Tugman, being duly sworn, deposes and says: I am the plaintiff above named. My attorney of record in the above-entitled action is Freeman J. Fithian, Esq., who died on or about the fourth day of August, 1884.

I now desire and request that James R. Carmichel, Esq., of No. 155 Broadway, New York city, be substituted as my attorney in the above-entitled action in the place and stead of said Freeman J. Fithian, deceased, and ask that an order be entered herein to that effect.

CHARLES H. TUGMAN.

Sworn to before me this 2nd day of December, 1885.

CHARLES L. THATCHER,
[L. S.] *Notary Public* (101), *New York County.*

Endorsed: Affidavit and order of substitution. Filed and entered March 19, 1886.

24 United States Circuit Court, Eastern District of New York.

CHARLES H. TUGMAN, Pl'ff,
against
THE NATIONAL STEAMSHIP COMPANY, Def't.

Present: Honorable Charles L. Benedict, district judge, holding the court.

On reading and filing the annexed affidavit of Charles H. Tugman, sworn to the 17th day of May, 1886, it is hereby ordered and decreed that James R. Carmichel, Esq., attorney and counselor at law, at No. 146 Broadway, New York city, be, and he hereby is, substituted as attorney or solicitor for plaintiff herein in the place and stead of S. S. Rowland, Esq., deceased. The order entered herein on the 19th day of March, 1886, is hereby cancelled and annulled, the same having been entered herein through error and by mistake.

Dated 17th day of May, 1886.

CHAS. L. BENEDICT.

25 Circuit Court of the United States, Eastern District of New York.

CHARLES H. TUGMAN, Pl'ff,
against
THE NATIONAL STEAMSHIP COMPANY, Def't.

STATE OF NEW YORK,
City and County of New York, } ss:

Charles H. Tugman, being duly sworn, deposes and says: I am the plaintiff above named. My attorney of record in the above-entitled action is S. S. Rowland, Esq., who died on or about the second day of March, 1880. I now desire and request that James R. Carmichel, Esq., of No. 146 Broadway, New York city, be substituted as my attorney in the above-entitled action in the place and stead of said S. S. Rowland, Esq., deceased, and ask that an order be entered herein to that effect, and I further ask that the order entered herein on the 19th day of March, 1886, which was entered by mistake, be annulled and the order hereby asked for be entered in its place and stead.

CHARLES H. TUGMAN.

Sworn to before me this 17th day of May, 1886.

F. SPECHT,
[L. S.] *Notary Public, Kings and N. Y. Counties.*

Endorsed: Order of substitution. Filed May 17, 1886.

26 U. S. Circuit Court, Eastern District of New York.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

I hereby consent that Messrs. Vanderpoel, Green & Cuming be substituted in my place and stead as attorneys for the plaintiff in the above-entitled action, and that an order to that effect may be entered.

Dated N. Y., September 3d, 1886.

JAMES R. CARMICHEL,
Plaintiff's Attorney.

Endorsed: Consent. Filed October 25, 1886.

27 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms on the 25th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

CHARLES H. TUGMAN
vs.
THE NATIONAL STEAMSHIP COMPANY.

On reading and filing the annexed consent and on motion of Vanderpoel, Green & Cuming, attorney- for the plaintiff herein, it is—
Ordered that said Vanderpoel, Green & Cuming be, and they are hereby, substituted as the attorney- for the plaintiff herein in the place and stead of James R. Carmichel.

CHAS. L. BENEDICT.

Endorsed: Order of substitution. Filed and entered 26th day of October, 1886.

28 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 7th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.
Present: The Honorable E. Henry Lacombe, circuit judge.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

Cause called. Hearing ordered.
Appearances: Mr. McCurdy, for the plaintiff; Mr. Chetwood, for the defendant.

Jury drawn.

* * * * * * *

Jury sworn.
Mr. Chetwood moves to compel plaintiff to pay costs in State court before the trial.
Motion denied.
Hearing suspended to May 8, 1888.

MAY 8, 1888.

Trial resumed.
29 Verdict directed for the plaintiff for amount of damages, four thousand and eighty-four dollars, with interest from February 18, 1875.

* * * * * * *

A true extract from the minutes.

30 U. S. Circuit Court, Eastern District of New York.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY. } Judgment.

The issues in this action having been regularly brought on for trial at the circuit court of the U. S. for the eastern district of New York, on the seventh day of May, 1888, before the Honorable

E. Henry Lacombe, U. S. circuit judge, and a jury, and a verdict having been directed therein on the eighth day of May, 1888, in favor of the plaintiff and against the defendant herein for the sum of four thousand and eighty-four dollars, with interest thereon from the 20th day of February, 1875; and a copy of the record, together with an extract from the minutes of the court showing said trial and verdict, being filed herewith, and plaintiff's costs having been adjusted at the sum of twenty-eight and $\frac{10}{100}$ dollars:

Now, on motion of Vanderpoel, Green & Cuming, attorneys for the plaintiff, it is adjudged that the plaintiff have and recover from the defendant the sum of $4,084, with interest thereon from the 20th day of February, 1875, amounting to $3,437.49, as found by the jury, and $28.10 costs, in all amounting to $7,549.59, seven thousand five hundred and forty-nine and $\frac{59}{100}$ dollars.

31 By the court:

B. LINCOLN BENEDICT, *Clerk.*

Dated June 22, 1888.

VANDERPOEL, GREEN & CUMING,
Attorneys for Plaintiff, 2 Wall Street, N. Y. City.

Endorsed: Judgment-roll. Filed June 22, 1888.

32 At a stated term of the circuit court of the United States for the eastern district of New York, in the second circuit, held at the city of Brooklyn, in said district, on the 7th and 8th days of May, A. D. 1888.

Present: Hon. E. Henry Lacombe, circuit judge.

CHARLES H. TUGMAN, Plaintiff,
against
THE NATIONAL STEAMSHIP, COMPANY LIMITED, Defendant.

A motion was made by the defendant to stay plaintiff's further proceedings in this action until the payment by him of the costs in this action as taxed by the clerk of the New York supreme court in Kings county, which included the costs in the United States Supreme Court, the costs in the New York supreme court, and the costs in the court of appeals in the State of New York, and upon such motion the following papers were read:

33 United States Circuit Court, Eastern District of New York.

CHARLES H. TUGMAN
vs.
NATIONAL STEAMSHIP COMPANY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Adam Gos, being duly sworn, on his oath says—

That he is and ever since a period long before the matters hereinafter stated was clerk in charge of the business of defendant's attorney.

The attorney by whom the action in the Kings county circuit was brought was S. S. Rowland. He died, and on July 2d, 1880, James R. Carmichael was substituted in his stead.

After the decision of the United States Supreme Court reversing the judgment in plaintiff's favor, Delos McCurdy, Esq., of Vanderpoel, Green & Cummings, intervened in the suit and told defendant's attorney that he had it in charge, with full authority both from plaintiff and from Carmichael. Before the costs were taxed he wrote a letter, hereto annexed, to defendant's attorney, dated October 6th, 1884, to which defendant's attorney sent an answer, as follows:

"OCT. 6, 1884.

"D'R SIR: We will have the costs Tugman suit formerly
34 taxed and then give you statement.

"Y'rs truly, JOHN CHETWOOD.

"Delos McCurdy, Esq."

Affidavit and notice — motion for allowance were then prepared and deponent personally served the same on Mr. McCurdy and got his admission of service, which he signed in the name of Carmichael and which are on file in the Kings county clerk's office.

It was agreed between Mr. McCurdy and defendant's attorney that such motion should be heard at their mutual convenience, and, although returnable on the 18th day of October, Mr. McCurdy's admission was signed on the 17th. On the 18th he had a court engagement elsewhere and the motion went over to November 1, 1884, when it was argued before Judge Bartlett, defendant's attorney being heard for the motion and Mr. McCurdy in opposition. The motion was granted on the hearing, which actually took place on Saturday, November 1, 1884; and deponent, himself drew the order, which recited that it was made on the affidavit and notice of motion, a copy of the pleadings and proceedings, and after hearing Mr. Chetwood for the motion and Mr. McCurdy in opposition, and granted an allowance of five hundred dollars in addition to the taxable costs. This order deponent himself submitted to Judge Bartlett on Monday, November 3d, who then initialed it; whereupon the clerk entered it on that day, and on the same day deponent
presented to Judge Bartlett and had granted by him the
35 order or judgment of reversal under the mandate of the U. S. Supreme Court.

On November 8th *postea* was filed covering the costs which had been taxed on notice, including the allowance, which amounted in all to $1,206.32, and a copy of the judgment and notice of entry thereof was served and service admitted in the name of Carmichael, which admission is hereto annexed. On October 25, 1886, an order of substitution of Vanderpoel, Green & Cuming, upon a consent of Carmichael dated September 3, 1886, was served on defendant's attorney, and also a notice of trial, all which were returned with an endorsement that they were returned because no proceedings on

plaintiff's part were regular while the $1,206.32 costs remained unpaid.

On the first day of the November circuit defendant's attorney attended the call of the calendar to object to plaintiff's proceedings until costs were paid. He reported to deponent, who has charge of the office register, that Judge Wheeler had overruled his objections and ordered cause tried; that Mr. McCurdy had answered ready.

That they had agreed not to remain and watch the calendar that day. During the rest of the term deponent constantly attended to watch the calendar, but nobody appeared for plaintiff, and when the cause was called no response was made either on behalf of plaintiff or defendant.

ADAM GOS.

Sworn to before me this January 20th, A. D. 1887.

MAY CARR GULICK,
Notary Public, Kings Co., N. Y.

Cert. filed N. Y. Co.

36 United States Circuit Court, Eastern District of New York.

CHARLES H. TUGMAN, Plaintiff,
against
THE NATIONAL STEAMSHIP COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles M. Conyers, being duly sworn, on his oath says that he is, in the absence of Francis W. J. Hurst, acting manager of the National Steamship Company, and when said Hurst is present he is next in authority to him; that said Hurst is at present absent; that deponent has been in the defendant's employment since the year 1860.

That deponent knows the plaintiff and his insolvency, and that defendants obtained a judgment against him in the superior court of the city of New York on October 22d, 1869, for $128.86, which they unsuccessfully tried to collect by execution.

Plaintiff, when this action was commenced, resided in Chicago, Illinois, and deponent has never heard of any change of such residence by him.

CHARLES M. CONYERS.

Sworn to before me this 20th day of January, 1887.

ADAM GOS,
Notary Public, Kings Co., N. Y.

Cert. filed N. Y. Co.

37 Supreme Court, Kings County.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

Service of a copy of the judgment in above action, with a notice

of the entry thereof on the 8th day of November, 1884, endorsed thereon, is hereby admitted.

November 8th, 1884.

JAS. R. CARMICHAEL,
Att'y — Plaintiff,
Per D. McC.

NEW YORK, *October 6th*, 1884.

MY DEAR SIR: In the case of National Steamship Co. *vs.* Tugman I find that you paid the fees and taxed bill of costs and the mandate was issued to you. If you will send us a statement of the amount thereof I will pay and we can go on with the trial of the case.

Very respectfully yours, DELOS McCURDY.
S.

John Chetwood, Esq.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, being possessed of the record and proceedings upon a remittitur from the court of appeals of the State of New York, Greeting:

Whereas lately, in the supreme court of the State of New York, before you or some of you, in a cause between Charles H. Tugman, plaintiff, and The National Steamship Company, defendant, upon a remittitur from the court of appeals of the State of New York, wherein the judgment of the said supreme court entered in said cause on the 12th day of February, A. D. 1879, is in the following words, viz:

"This cause having been brought on upon the remittitur therein sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the defendants from the judgment of this court to the said court of appeals, and that the judgment appealed from had been affirmed with costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court and this court directed to enforce the said judgment of the court of appeals according to law:

39 Now, therefore, on motion of S. S. Rowland, counsel for the plaintiff, it is—

Ordered and adjudged that the judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the plaintiff have execution against the defendants for the costs when adjusted by the clerk and inserted in this judgment, as well as for the amount adjudged to be recovered in and by the judgment of this court entered the 27th day of June, 1877, and the judgment for costs entered February 19, 1878, and that this order or judgment be annexed to the judgment record herein," as by the inspection of the transcript of the record of the said supreme court, which was brought into the Supreme Court of the

United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-two, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of the record, and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said court of appeals and supreme court in this cause be, and the same are hereby, reversed with costs, and that the said defendant, The National Steamship Company, recover against the said plaintiff one hundred and
40 eight dollars and thirty-four cents for its costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the supreme court of the State of New York with instructions to accept the bond tendered by the present plaintiff in error for the removal of the cause to the circuit court of the United States for the eastern district of that State, and proceed no further in the cause.

6TH NOVEMBER, 1882.

And the same is hereby remanded to you, the said judges of the said supreme court of the State of New York, in order that such execution and further proceedings may be had in the said cause, in conformity to the judgment and decree of this court above stated, as, according to right and justice and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the first day of March, in the year of our Lord one thousand eight hundred and eighty-four.

Costs of defendant:

Clerk	$88 34
Attorney	20 00
	108 34

Taxed by—

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

41 At a special term of the supreme court of the State of New York, held at the county court-house, in the city of Brooklyn, county of Kings, on the third day of November, A. D. 1884.

Present: Hon. Willard Bartlett, justice.

CHARLES H. TUGMAN, Plaintiff,
against
THE NATIONAL STEAMSHIP COMPANY, Defendant.

The Supreme Court of the United States having issued its mandate herein, wherein and whereby it was, among other things,

ordered and adjudged "that the judgments of the said court of appeals and supreme court in this cause be, and the same are hereby, reversed with costs," and "that this cause be, and the same is hereby, remanded to the supreme court of the State of New York, with instructions to accept the bond tendered by the present plaintiff in error for the removal of the said cause to the circuit court of the United States for the eastern district of that State and proceed no further in the cause;"

And the said mandate having been duly filed, it is now
42 ordered that the judgment entered in this action on the 27th day of June, 1877, for the sum of $4,992.71, the judgment entered (upon the order of the general term affirming the last-mentioned judgment) on the 19th day of February, 1878, for the sum of $72.65, costs, and the judgment entered (on the remittitur from the court of appeals affirming the above-mentioned judgments) on the 24th day of January, 1879, for $123.85, costs, be, and each of the said judgments is hereby, in all things reversed with the costs to the defendant, to be taxed, and that judgment be entered accordingly.

And the bond tendered by the defendant for the removal of this action to the circuit court of the United States for the eastern district of New York is hereby accepted.

Enter.

W. B.

Granted Nov. 3, 1884.

RODNEY THURSBY, *Clerk.*

43 N. Y. Supreme Court.

CHARLES H. TUGMAN, Plaintiff,
against
THE NATIONAL STEAMSHIP COMPANY, Defendant.

Take notice that upon the pleadings and proceedings in this action and upon the affidavit of John Chetwood, hereto annexed, I shall move, at a special term of the supreme court to be held at the county court-house, in the city of Brooklyn, county of Kings, on the 18th day of October inst., at 10 o'clock a. m., for an order awarding to the defendant a further sum in addition to its costs herein.

Dated October 8th, A. D. 1884.

Yours, JOHN CHETWOOD,
Att'y for Defendant.

To Jas. R. Carmichael, Esq., plaintiff's attorney.

(Endorsed:) Service admitted 17th October, 1884. Jas. R. Carmichael, plaintiff's att'y. Filed Nov. 3d, 1884.

44 N. Y. Supreme Court.

CHARLES H. TUGMAN, Plaintiff,
against
THE NATIONAL STEAMSHIP COMPANY, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

John Chetwood, being duly sworn, on his oath says that he is the defendant's attorney in this action, which was commenced in June, 1875, by the plaintiff, a citizen of the United States, against the defendant, a British corporation, to recover some $10,000 damages.

Defendant took the necessary steps to remove the action into the United States circuit court for the eastern district of New York, but the court refused to permit the removal and held the action. Defendant's objections to jurisdiction were overruled, and the action was tried by a referee appointed by the court. The trial extended from January 24th to May 26, 1877, and there were some nine hearings and as many adjournments.

The result of the trial was a report in plaintiff's favor by Henry Nicoll, Esq., the referee, since deceased. He certified that the action was a difficult and extraordinary one, and plaintiff thereupon got an extra allowance of five per cent., and judgment was en-
45 tered on the referee's report June 27th, 1877, for $5,172.91, reduced by order of the court on July 23d, 1877, to $4,992.71, which included costs and extra allowance.

From this judgment an appeal was taken by defendant to the general term, where it was affirmed, with $72.60 costs; from which judgment of affirmance an appeal was taken to the court of appeals, where both judgments were affirmed, with costs, which were taxed at $123.85.

Defendant then took out a writ of error from the United States Supreme Court to the supreme court of the State of New York, in this judicial department, wherein judgment had been entered upon the remittitur from the court of appeals in this action, and upon the argument of such writ of error the said judgments of the courts of this State in this action were reversed, with costs, and said court issued its mandate accordingly.

The appeals in the general term and to the court of appeals were orally argued, in addition to printed briefs, and so was the case on the writ of error to the United States Supreme Court.

There were several motions orally argued throughout the pendency of the litigation, and a motion was made by plaintiff in the United States Supreme Court and submitted on printed briefs to dismiss the appeals, which was denied.

The case is a difficult and extraordinary one in deponent's opinion.

JOHN CHETWOOD.

Sworn to before me this Oct. 8th, 1884.

ADAM GOS,
Notary Public, Kings Co.

Certificate filed N. Y. Co.

46 At a special term of the supreme court, held at the county court-house, in the city of Brooklyn, county of Kings, on the third day of November, A. D. 1884.

Present: Hon. Willard Bartlett, justice.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

Upon reading and filing the affidavit of John Chetwood, the attorney for the defendant herein, and proof of due service on plaintiff's attorney of a copy of said affidavit, and of notice of motion for this order, after hearing John Chetwood, Esq., in support of the motion, and D. R. McCurdy, Esq., in opposition, it is hereby—

Ordered that the defendant be, and it is hereby, awarded, in addition to its taxable costs, the further sum of five hundred dollars.

Enter.

W. B.

Granted Nov. 3, 1884.

RODNEY THURSBY, *Clerk.*

47 N. Y. Supreme Court, Kings County.

CHARLES H. TUGMAN, Plaintiff,
against
THE NATIONAL STEAMSHIP COMPANY, Defendant.
} Defendant's Costs.

(Here follow the items of costs, disbursements, and allowances.)

Taxed, Nov. 5th, 1884, at 1,206.33.

RODNEY THURSBY, *Clerk.*

Retaxed at 1,206.33.

RODNEY THURSBY, *Clerk.*

Take notice that the foregoing bill of costs will be presented to the clerk of the N. Y. supreme court, at his office, in the county court-house, in the city of Brooklyn, Kings Co., N. Y., on the 8th day of November inst., at 9½ o'clock a. m., for retaxation.

Dated November 5th, 1884.

Yours, JOHN CHETWOOD,
Def't's Att'y.

To Jas. R. Carmichael, Esq., att'y for plaintiff.

(Endorsed:) Due service of a copy of the within bill of costs and notice of taxation thereof is hereby admitted Nov. 5, 1884. Filed Nov. 8th, 1884. Jas. R. Carmichael, pl'ff's att'y.

48 N. Y. Supreme Court, Kings County.

CHARLES H. TUGMAN, Plaintiff,
against
THE NATIONAL STEAMSHIP COMPANY, Defendant.

The Supreme Court of the United States having issued its mandate to the judges of this court, wherein and whereby it was ordered and adjudged, among other things, that the judgments of the court of appeals and of this court in this action be reversed with costs, and that this action be remanded to this court in order that such execution and further proceedings might be had herein in conformity to the judgment and decree of the said court;

And an order having thereupon been made by this court and entered on the third day of November instant that the judgments entered herein on the 27th day of June, 1877, and the judgment entered herein on the 19th day of February, 1878, and the judgment entered herein on the 28th day of February, 1879, be reversed with costs; and an order having been made and entered herein on the third day of November instant awarding to the defendant, in addition to its taxable costs, the further sum of five hundred dollars and the costs of the defendant, including such further
49 sum, having been duly taxed at the sum of twelve hundred and six $\frac{33}{100}$ dollars—

It is now, on this eighth day of November, A. D. 1884, on motion of John Chetwood, the defendant's attorney, ordered and adjudged that the said judgments so as aforesaid entered in this action on the 27th day of June, 1877, 19th day of February, 1878, and 24th day of February, 1879, be, and each of them is, in all things hereby reversed.

And it is further ordered and adjudged that The National Steamship Company, the defendant, recover of Charles H. Tugman, the plaintiff, the sum of twelve hundred and six and $\frac{33}{100}$ dollars, the amount of its costs as taxed, and that execution do issue therefor.

RODNEY THURSBY, *Clerk.*

Endorsed: Filed Nov. 8, 1884, 10 a. m.

50 The court ordered that plaintiff's proceedings be stayed until the payment of the costs in the United States Supreme Court.

Thereupon plaintiff in open court tendered to defendant the amount of the costs in the United States Supreme Court, which defendant refused to receive, because, as it insisted, it was entitled to all the costs so as aforesaid taxed by the clerk of the New York supreme court.

The motion for a stay until all the costs as taxed by the clerk of the New York supreme court was then denied.

To which ruling and decision of the court the defendant then and there duly excepted. After the denial of the defendant's motion for a stay — the tender by plaintiff of the costs in the United States Supreme Court and defendant's refusal to receive the same, and not-

withstanding defendant's objection because of its right to a stay as claimed in its motion and over its exception to the denial of such stay, the issues joined on the action came on to be tried at the aforesaid stated term of the court.

CHARLES H. TUGMAN (the plaintiff) was then called as a witness on plaintiff's behalf, and testified as follows:

That in the years 1874 and 1875 he resided in Chicago. His business was that of a pork-packer and curer of provisions for foreign markets; that he had a conversation in 1874 in respect to a
51 freight contract with Mr. George Carhart, the contracting freight agent for the National Steamship Company in Chicago.

That Carhart came to him on the board of trade and said: "Mr. Tugman, do you want any future freight?" That witness asked him what freight he had to offer, and Carhart said he had got a thousand tons of ocean freight from New York to Liverpool at 27 shillings and 6 pence a long ton. Witness asked for what months, and Carhart said December, 1874, and January, 1875, shipper's option. Witness said he would take that.

By shipper's option is meant any time from the first of December to the thirty-first of January it would please him to ship.

That witness asked Carhart what line it was, and Carhart told him again it was the National Steamship Company. Witness then said, "Let me have a contract for that;" and Carhart said, "I close it with you now." That in the months of December, 1874, and January, 1875, he shipped or caused to be shipped over the National line the whole lot—over a thousand tons of freight.

That the price at which Carhart offered the future freight and upon which witness closed with him was 27 shillings and 6 pence per ton or 31 cents a hundred. That was on the 8th of October, 1874. Between that time and the shipment ocean freight had advanced considerable—from 50 to 75 per cent.; from 27 shillings and 6 pence a ton up to 60 shillings a ton, or 31 cents a hundred up to 92 cents a hundred.

52 That the average difference of advance in his shipments was 19½ cents, gold, per hundred pounds.

Q. Was the contract you made a contract in gold or national currency?

A. In gold.

Q. Was that spoken of at the time?

A. Yes, sir.

Q. Was there at that period of time any premium on gold?

A. December and January it was 13½ to 14 per cent. premium.

DEFENDANT'S COUNSEL: Is that at all material?

The COURT: It may become very material, but I don't know whether it will or not.

DEFENDANT'S COUNSEL: The rule has been laid down that the recovery, if any, shall be in gold, and gold is gold now.

Q. Do you know whether the National Steamship Company were paid the rate of freight you speak of?

DEFENDANT'S COUNSEL: How does he know?
Q. Do you know?
A. Yes.

Witness further testified that the difference in freight between the contract for future freight and the freight realized by the steamship company was 19½ cents. A difference of 19½ cents per hundred on the amount of freight shipped would make a difference of about $4,084.

Witness was then asked the—

Q. Have you applied to the National Steamship Company for that difference?

A. I expected Mr. Carhart to pay me as the agent.

53 Q. Did you call upon the National Steamship Co. for that difference in freight?

A. Yes, sir.
Q. Did you demand it of them?
A. Yes, sir.
Q. Did they refuse payment?
A. Yes.
Q. They have not paid you any portion of it?
A. No.

On cross-examination the witness testified as follows:

That at the time the interview with Carhart took place he had been in Chicago from 1869 to 1874; that before then he was in business in New York; that he had transactions in New York with the defendant, shipping butter, cheese, and bacon.

The witness was then asked the—

Q. Did you always pay them?

Plaintiff's counsel objected to the question as immaterial and incompetent.

Defendant's counsel offered to prove that the plaintiff went from New York insolvent and a judgment debtor to the defendant; that he established himself in Chicago, and in combination with Carhart; the scheme was concocted by which a man of straw should be given apparently a contract with this defendant for a future shipment.

THE COURT: That tends to make out a species of conspiracy, which I think should be pleaded in order to be proved. You cannot, it seems to me, prove such a complicated conspiracy as that would seem to indicate under a general denial.

The court excluded the testimony as not within the issues raised by the pleadings.

To which ruling of the court the defendant then and there duly excepted.

The witness was then asked the—

Q. Is there a judgment now pending in favor of the defendant against you?

Plaintiff's counsel objected to the question as immaterial and incompetent.

54 The court sustained the objection on the ground that the proof offered was not within the issues raised by the pleadings.

To which ruling the defendant then and there duly excepted.

The witness further testified—

That at the time this transaction took place he was a member of the Board of Trade of Chicago, from 1869 to 1884.

That he had an office there, at No. 61 Clark St.

The witness was then asked the—

Q. Was anybody else in the office with you?
A. Yes.
Q. Who?
A. The State Line Steamship Co.
Q. Was there any other company in that office?
A. Yes.
Q. What other?
A. The Erie & Pacific Despatch.
Q. Then your office was in the same office with Carhart?
A. Yes.
Q. He was the agent there of the Erie and Pacific Despatch?
A. Yes.
Q. Who was employed by the Erie & Pacific Despatch at Chicago besides Mr. Carhart?
A. His clerk.
Q. What was his name?
A. I don't recollect his name.
Q. Who was the Western agent of the Erie & Pacific Despatch in that office?
A. I don't know.
Q. Who was the man who shipped westward?
A. There was nobody there.
Q. Who was your landlord for that office?
A. The proprietor of the Sherman house.
Q. To whom did you pay rent?
A. To Mr. Carhart.
Q. Did you pay it in full?
A. I paid it every month.
Q. Did you pay it in full?
A. Why, certainly.

55 Q. And now you state positively and affirmatively that all the rent which you owed to Carhart for the rent of that office you paid?
A. No, sir; I don't say anything of the kind.
Q. What do you say, then? I so understood you to say.

Plaintiff's counsel objected to the question as incompetent.

The court sustained the objection.

To which ruling of the court the defendant then and there excepted.

Q. How came it that you and Mr. Carhart had this meeting on the board of trade, when you had a room or desk in the same office and he was your landlord there?

A. He was pursuing his business and I was pursuing mine.

Q. And you didn't pursue each other in the office?

A. He met me on the board of trade, and I presume had got this offer, and knowing me to be a shipper offered it to me.

Q. Then there was a feeling of delicacy between you, so that you did not talk business in the office, but postponed it to the board of trade?

A. Why, certainly.

Q. Always did that?

A. Certainly; we have always done it for years.

The witness further testified that Carhart was agent for all the steamship companies that gave him freight, for all that gave him the rates of ocean freight; that the Erie & Pacific Despatch carried from Chicago to New York freight for every steamship line—the Inman, Cunard, the White Star, and all other lines, and that he shipped by every one of them; that he (the witness) shipped 65 tons of the freight.

56 PLAINTIFF'S COUNSEL: When did he say that? That must have been on the former trial.

Q. Did you ship any of that freight yourself?

A. Most assuredly.

Q. How much of it?

A. 65 tons.

Q. In what name was it shipped?

A. Thomas Kent, in the name of Thomas Kent.

Q. But you were the shipper?

A. Yes, sir.

Q. Did your name appear in the bill of lading?

A. No, sir.

Q. It did not?

A. No, sir.

Q. You didn't put your name in the bill of lading?

A. No, sir.

Q. Is not it usual that a bill of lading shall express the shipper's name, and also the consignee's name?

Objected to as immaterial and incompetent.

Q. How is it material in any way?

DEFENDANT'S COUNSEL: I suppose I have a right to go into the detail of his testimony with regard to what he did under this contract.

The COURT: So far as appears now he had a contract whereby the defendant engaged to transport freight across the ocean at certain rates, and he has testified that he sent freight. Now, is it material in what name he sent freight?

DEFENDANT'S COUNSEL: He is insisting upon having made this

contract and having shipped under it, and I want to follow him along and find out how much he knows. It is very apparent that he has sworn to a great deal that he cannot possibly know himself, and I want to follow him along and get the details of it, so as to ascertain exactly what he knows.

57

The COURT: But you are asking him now, it seems to me, an immaterial question—whether his name appeared on the papers.

DEFENDANT'S COUNSEL: I want to prove this: That he should have shipped 65 tons in his own name, unless there was some other object.

PLAINTIFF'S COUNSEL: Well, let it go.

Q. What is usual in a bill of lading? Isn't it usual that the shipper's name is put in?

A. Well, Banford Bros., of Liverpool, have their agents in Chicago who make advances to packers upon a consignment to them.

DEFENDANT'S COUNSEL: I object to that answer.

The COURT: The objection is overruled.

To which ruling of the court the defendant then and there duly excepted.

A. They make advances to packers upon consignments to them in Liverpool. Now, when they make cash advances they draw the bill of lading, and therefore become the shippers, and they have got the security upon that piece of paper. It is out of the real owner's power when they give me the full advance, and that was my contract with them in Liverpool, that their agent should advance me money as I wanted and I should hand them the goods I was consigning to Liverpool.

Q. Banford Bros. did not appear in connection with this?

A. Thomas Kent was their agent.

58

Q. You were not their agent?

A. No; but I was shipping goods to them that I cured.

The witness was then asked the—

Q. What do you know about the actual shipment of those 65 tons, and did you see it shipped?

A. I saw most of it put on the cars in Chicago.

Q. Where?

A. In the various packing-houses.

Q. You say you saw most of it. Now, how much?

A. I must have seen the bulk of it.

Q. But you only assume the case. You don't state positively what amount you did see, and you cannot state that, can you?

A. I can't tell by the ounce.

Q. Nor by the pound?

A. Nor by the pound.

Q. How about the other freight that was shipped?

A. Henry, Mellwood, Coey & Co., Hogan & Co., Kirkwood & Co., and Fowler Bros. & Co. all came to me and gave me their freight to ship, because they knew I had this contract, and I gave it to them

at a low rate. I saw most of this freight shipped. I will say all of it. I will say every pound of it that was in a box. I did not weigh every pound of it.

Q. So far as any observation or any personal knowledge of yours goes, that was the end of it, wasn't it?

A. I told Mr. Carhart to take this on account of my contract. That was his engagement, and so he did. He shipped them.

Q. Did you see it shipped?

A. I saw it put upon the railroad cars. That was the last
59 I saw it. I did not follow it down to New York.

Q. Did you yourself go around when this freight was shipped and see it all with your own eyes and under your own inspection put in the cars?

A. My business is attending to my packing-house.

Q. Did you yourself go around when this freight was shipped and see it all with your own eyes and under your own inspection put into the cars?

A. I did not see every pound of it.

Q. You swore that the steamship company were paid the increased rates of freight?

A. Yes, sir.

Q. How do you know that?

A. By their testimony.

Defendant's counsel moved to strike out the testimony of the witness that defendant was paid the extra freight.

The court allowed the testimony to stand.

To which ruling the defendant than and there duly excepted.

Q. By what testimony do you know it?

A. I presume they must have collected it, inasmuch as I gave the difference of freight to be collected by Mr. Debow here in New York, who was president of the Erie & Pacific Despatch.

Q. I ask you for what you know, and you are not to say anything that De Bow told you.

A. Well, he said that they had received it, and that he had applied——

DEFENDANT'S COUNSEL: I move to strike that out as hearsay.

THE COURT: He is testifying to the sources of his information and the grounds of his belief as to matters that you brought out
60 on cross-examination. When you get *when you get* through with your evidence you may make a motion to strike out the direct testimony, and I will see whether I will do it or not.

Defendant excepted.

Q. You yourself never personally applied to the National Steamship Co. to pay this?

A. No, sir.

Q. You never had an interview with Mr. Hurst in New York?

A. I was in Chicago.

Q. You never personally applied to the company to pay this, either through Mr. Hurst or any agent?

A. I was in Chicago.
Q. Either then or afterwards?
A. I left it with the Erie & Pacific Despatch.
Q. You never had an interview with Mr. Hurst or any representative of the company with regard to it?
A. No, sir.

Defendant's counsel moved the court to strike out the testimony of the witness in relation to the collection of extra freight by the defendant as hearsay.

The court denied the motion; to which ruling of the court the defendant then and there duly excepted.

The witness, on re-examination, further testified that he saw an affidavit of F. W. J. Hurst, verified April 12th, 1887, in which he swears that he was agent of the National Steamship Co., which was used on a motion made by defendant's counsel before the referee.

Plaintiff's counsel asked defendant's counsel if he had the original of that affidavit.

Defendant's counsel replied not that he knew of.

61 Plaintiff's counsel offered the copy affidavit in evidence.

Defendant's counsel objected to its admission on the ground that it purports only to be a copy and that it is not proved; and also objected to its admission that it purports to be an affidavit of Mr. Hurst made in a proceeding which the U. S. Supreme Court held to be utterly invalid and not in evidence.

Plaintiff's counsel asked defendant's counsel to produce the original.

Defendant's counsel replied that he could not produce the original, because he did not know where it was.

Plaintiff's counsel then offered in evidence a copy of the affidavit.

The COURT: Does the attorney's name appear or is there any mark or indication on the face of the paper proving that it is a copy?

PLAINTIFF'S COUNSEL: No, sir; I will prove it now.

The witness, being shown the copy affidavit, testified that he saw it before the referee; that he remembered that a motion was made before the referee to amend the answer, and setting up that he and others had conspired to defraud, or something of that kind; that this affidavit was in the hands of his attorney at the time, and he believed it was the paper or a copy of the paper which was served on him.

Plaintiff's counsel then offered to read the paper in evi-

62 dence.

Defendant's counsel objected because it was a paper in a proceeding which the U. S. Supreme Court had deemed was utterly invalid.

PLAINTIFF'S COUNSEL: The court decided that the petition which was filed should have been recognized by the courts instead of rejected by them.

The COURT: But they did not stamp the action with illegality.

PLAINTIFF'S COUNSEL: Not at all.

The COURT: And this is the same action which you began in the State court and which stands removed here?

PLAINTIFF'S COUNSEL: Yes, sir; the only question the Supreme Court of the United States decided was the question of removal.

The State court held that the petition was not sufficient and would not order its removal.

The COURT: Every order thereafter made was *coram non judice*, but this is not an order and is not presented as being an order or determination of court. It is simply a voluntary statement under oath of one of the parties, being the agent of the defendant, and made in the course of the proceedings.

The DEFENDANT'S COUNSEL: The supreme court has stamped the character of these entire proceedings as absolutely invalid. The Supreme Court of the United States being the highest judi-
63 cial authority in the Government, it seems to me highly improper in a court of the higher jurisdiction to entertain and to admit as evidence any kind of paper which was made in any of these irregular proceedings.

The COURT: This is not a paper in a proceeding. If it were a sworn statement of one of the parties and voluntarily made in an entirely different case from this, why should it not be admitted here? Suppose that instead of being entitled in this very suit it were entitled in a cause appearing in the 106 U. S. Reports, why should it not be admitted? It is the voluntary statement of the party and a statement in which you had entire notice.

DEFENDANT'S COUNSEL: Another objection is that it is not regularly proved.

PLAINTIFF'S COUNSEL: Did you serve us with the original?

DEFENDANT'S COUNSEL: I don't recollect now what I served you with, but it is not the ordinary practice to serve the original upon counsel on the other side.

The COURT: I shall admit this (if it is admitted) upon the grounds that it is the sworn statement of one of the parties irrespective entirely of the fact whether it was made in this particular suit or not. It is a sworn statement of the defendant, moreover, which is made when his interests are being protected, in that the sworn statement is made under the questioning of his own counsel. There may, however, be something in the point whether this copy
64 is sufficiently proved. As to the other point, I am clearly of the opinion that it is admissible.

DEFENDANT'S COUNSEL: Will your honor give us an exception as to that?

(Exception granted.)

Defendant's counsel also objected that there is no proof that this is a copy; the loss of the original is not accounted for.

PLAINTIFF'S COUNSEL: I suppose your honor takes judicial notice of the fact that this original would not be served on us. Now, if that be so, that this is not a correct copy, then they may produce

the original of the affidavit, and if this witness shall have the temerity to say or we shall have the temerity to rely upon the fact that this is a correct copy and they produce the original and it turns out that this is not a correct copy, then we have not only lost the benefit of the testimony, but we have jeopardized our own interest by putting in a copy which my learned friend says is not correct.

DEFENDANT'S COUNSEL: This witness has shown his temerity already by stating that the copy was used before the referee.

PLAINTIFF'S COUNSEL: This is the copy that was used before the referee, without doubt.

The COURT: Is the counsel who appeared for the plaintiff upon that reference dead?

65 PLAINTIFF'S COUNSEL: Yes, sir.

The COURT (examining the package of papers containing the copy affidavit): The order to show cause appears to be endorsed by the name of "John Chetwood, 74 Broadway, New York." There is no dispute that that is your name, is there?

DEFENDANT'S COUNSEL: That is my name, and at that time that was my address. I find in this package of papers certain papers that I know nothing whatever of.

PLAINTIFF'S COUNSEL: I don't offer anything in evidence from that package except the affidavit of Mr. Hurst.

The COURT: I think you must show at least affirmatively in some way or other that this order to show cause with the affidavits referred to therein was issued by Mr. Chetwood's office. Mr. Chetwood is here, and you can call him as to that one point.

Plaintiffs thereupon called a witness on his behalf JOHN CHETWOOD, who, being duly sworn, testified as follows:

Q. Were you the attorney and have you been the attorney for the defendant in this action since its inception?

A. Yes.

Q. Did Mr. F. W. J. Hurst swear on the 12th day of April, 1877, before Adam Gos, a notary public, to an affidavit of which that is a copy (showing witness the copy affidavit offered in evidence)?

A. I have no distinct recollection of it, except so far as this paper speaks for itself.

66 Q. In your judgment, is that a correct copy?

A. That I can't say. My recollection would not go as far as that.

Q. Will it go so far as to enable you to state that he did not make such an affidavit?

A. No.

Q. You think he did?

A. Well, I can't go even to that extent.

Q. You can't think about it?

A. I do think Mr. Hurst made an affidavit. Whether or no that is a copy I cannot tell.

Q. Will you produce an original of an affidavit made by Mr. Hurst on the 12th day of April, 1877, and verified by him before Adam Gos, notary public?

A. I cannot produce it, because if such a paper exists it went, I suppose, to the files of the court.

Q. I ask you will you produce it.

A. I cannot produce it, because, so far as my recollection goes, I verily believe it is not in my custody.

Q. Why would it go on the files of the court?

A. Because that is the ordinary course taken with orders to show cause and affidavits.

Q. Was such an affidavit as that taken in order to procure an order to show cause?

A. I think it was.

Q. Is the paper annexed to that affidavit a copy of the order to show cause for which that affidavit was verified?

A. I see the paper, but I did not see it before. Among this mass of papers is one which is an affidavit made by Mr. Feltham.

PLAINTIFF'S COUNSEL: Those are papers on both sides of
67 the motion, and that is what is the difficulty with them.

The WITNESS: There was an order to show cause, but whether that is a copy of it I do not know. The order was procured either by me or by my office.

Q. And there is also attached to those papers the affidavit of Mr. Hurst, being the affidavit of merits in that action?

A. There is a copy of the ordinary affidavit of merits on a printed blank. According to this copy it is verified on the 3d of August, 1875.

Q. You think that the original of that affidavit of Mr. Hurst was filed in the court upon procuring the order to show cause?

A. That is my impression. Will you allow me to ask my clerk, who manages those things and knows more about it than I do?

Q. Did you file that affidavit at any time, so far as you know?

A. I know there was an order to show cause. I know that that order to show cause was granted. I am talking now by presumption. My memory is not good, and I did not follow those details of practices myself, and I presume, without stating it positively, that when the order to show cause was made absolute the papers were all filed.

(By the court:)

Q. Before whom was the order to show cause returnable?

A. Before the supreme court judge; that is what I meant to say with regard to Mr. Tugman's mistake, that that never would have been before the referee.

Q. Is this copy affidavit of Mr. Hurst and the copy affi-
68 davit of merits and copy order to show cause in the handwriting of some one in your office at that time?

A. I think the copy of Mr. Hurst's affidavit is in the handwriting of a clerk who was in my office then.

Q. Have you any doubt that the copy affidavit is in the handwriting of your office—a copy affidavit presented as the copy served on the other side with the order to show cause at that time?

A. I have no doubt that that copy is a copy of a paper made by a clerk in my office at that time. I know there was an order to show cause applied for and obtained, and that is in the handwriting of a clerk in my office at the time.

Q. Have you any doubt that that copy affidavit in the handwriting of a clerk in your office is the copy served with the order to show cause upon the other side?

A. I think there is a strong probability of it.

Q. Have you any doubt about it?

A. I hesitate to commit myself to that extent.

Q. Who was the clerk?

A. John Dorans. He is now in the employ of the N. Y. Central Railroad Company, in the offices at old St. John's square. Adam Gos was my managing clerk at that time. He is in court now.

Plaintiff then called as a witness on his behalf ADAM GOS, who, being duly sworn, testified as follows:

I was managing clerk for Mr. John Chetwood in 1877. I
69 recognize the handwriting in the paper now shown me, which was shown to Mr. Chetwood when he was examined. It was done by a clerk in the office I was a notary public in on April 12th, 1877, and in Mr. Chetwood's office. Mr. Hurst was the agent of the National Steamship Co., which was a client of Mr. Chetwood. He frequented the office about that time. He made affidavits before me as a notary public about that time.

Q. Look at that affidavit, purporting to be signed by Mr. Hurst. I call your attention particularly to the last pages of it, "It is only since the last hearing," &c., and read that sentence.

A. I have read it.

Q. Do you recollect Mr. Hurst making an affidavit of about that character and for that purpose?

A. I have no recollection of the contents of the affidavit. I know he did make an affidavit for the purpose of amending the answer.

Q. And that is the purpose expressed there?

A. Yes; but I have no recollection of that. I don't recollect that as the contents of the original.

Q. Do you know where the original is?

A. The motion was made before Judge Pratt, and I suppose the papers were filed with the order.

Q. Do you know where the original is?

A. I have not seen it since the day the motion was made. I did not serve copies of the motion papers. Very likely I did cause them to be served; that is my recollection.

Q. Don't you know that this paper is a copy of the affidavit of Mr. Hurst that was served?

70 A. I don't know that I compared them; I couldn't swear that I did.

Q. That is your custom, to compare papers before you let them them go out?

A. Sometimes I do and sometimes the other clerks do; presumptively this one was.

Q. Have you any doubt that that copy is a copy of the affidavit which was served with the copy order to show cause on making that motion?

A. No; I have no doubt about that affidavit. It is in the handwriting of one of the clerks in the office at that time.

Plaintiff's counsel offered to read the paper in evidence.

Defendant's counsel objected to its admission upon all the grounds before stated.

The court overruled the objections.

To which ruling the defendant then and there duly excepted.

Plaintiff's counsel then read in evidence the said copy affidavit (which was marked Plaintiff's Exhibit A), of which the following is a copy:

Supreme Court.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

CITY AND COUNTY OF NEW YORK, *ss:*

Francis W. J. Hurst, being duly sworn, on his oath says—

71 That he is the sole managing agent of the defendants, who run a line of steamships between New York and Liverpool.

That the Erie and Pacific Despatch, an inland transportation line between New York and Chicago, applied to defendants in October 1874, for the rate at which they would take 1,000 tons of freight to be shipped from Chicago to Liverpool during December, 1874, and January, 1875, ocean transportation by defendants' ships, giving defendants to understand that they had received such an application from a person in Chicago intending to ship.

That defendant- had been in the habit, as such despatch company well knew, of authorizing them to make such contracts with actual shippers, and, supposing such to be the case in this instance, a rate was named by defendants, which, as such despatch company well knew, was only to be offered to an actual *bona fide* shipper.

That said 1,000 tons of freight, with a trifling exception, were shipped by other people and not by the plaintiff; that the ocean rate having risen, defendants collected the excess on the other side and refused to account for it in any way to plaintiff, with whom they supposed they had no contract and to whom they supposed they were under no liability.

That on being sued by plaintiff they consequently set up as their defence in the action a general denial.

72 That since the action has been on trial before the referee deponent finds that a part of their defence consists in the fact that there was a fraudulent combination between the plaintiff and the Erie & Pacific Despatch or its officers to get, improperly and by suppression of facts, from defendants a rate of freight which would enable them to speculate at the expense of these defendants.

That deponent himself has knowledge of and is prepared by other witnesses to prove facts which, as he is advised by his counsel, tend to establish a defense by reason of the fraudulent acts and bad faith of the plaintiff in connection with the Erie & Pacific Despatch and its officers; and that the same would be ruled out on the pleadings as they now stand.

That it is only since the last hearing that deponent has been apprised of this condition of things, and he is anxious for leave to the defendants to amend their answer that he may have the opportunity, as he believes he can, of establishing this defense.

Defendants are a solvent corporation, with a paid-up capital of several million dollars, and almost always have a ship in the harbor worth at least half a million dollars.

F. W. J. HURST.

Sworn before me this April 12th, 1877.

ADAM GOS,
Notary Public, N. Y. Co.

73 Plaintiff then called as a witness on his behalf GEORGE W. CARHART, who, being duly sworn, testified as follows:

That he resides at Bath Beach. In the years 1874 and 1875 he resided in Chicago. He was then agent of the Erie & Pacific Despatch, a fast freight line running over the Erie railway and its connections from Chicago to New York. They were constantly shipping freight as a freight line through to all points in Europe from Chicago over the National Company's line of steamers.

He was then asked the—

Q. In the fall of 1874 was the National Steamship Company, to your knowledge, seeking future freight contracts?

A. I don't know as to that; they were always seeking business.

Q. But you don't remember the particular dates?

A. No, sir; all companies seek to make contracts for future freights. The National Steamship Company does it and did it. In the fall of 1874 I made a contract with Mr. Tugman for some freight to be shipped by the Erie & Pacific Despatch and the National Steamship Company. We offered him an ocean rate. My impression is that it was 27 shillings and 6 pence per ton. Mr. Tugman under that contract shipped freight.

Q. Look at the papers shown you and tell me what they are.

A. These are the Erie Railway Company's freight bills.

Q. Are these the Erie Railway Company's freight bills for freight shipped by Mr. Tugman under that contract through your
74 company to the National Steamship Co.?

A. These are consigned to the National Steamship Company.

Q. Do those bills represent this lot of freight or was it something else?

A. These are New York papers.

Q. Do you know anything about them?

A. These are New York papers, and I was in Chicago at the time.

Q. Do you know how many tons Mr. Tugman shipped under that contract?

A. We filled the engagement, or nearly so.

DEFENDANT'S COUNSEL: What you must testify to now is your own knowledge.

Q. Do you know how many tons Mr. Tugman shipped under that contract?

A. We filled the engagement as per contract as nearly as we could.

Q. Do you happen to know whether at that time other steamship companies were offering contracts for future freight at about the same rate?

Objected to as immaterial. Allowed, and defendant's counsel duly excepted.

A. Yes, sir.

Q. Then that contract offered by you on behalf of the National Steamship Co. to Mr. Tugman was not an unusual contract at all?

A. No, sir.

Q. Something has been said here about Mr. Tugman being in your office. Was Mr. Tugman in any manner connected with the Erie & Pacific Despatch?

A. No.

Q. He had a separate and distinct business of his own?

A. Yes, sir.

Q. He had no relation whatever with your company, but
75 simply had office room there?

A. That is all.

Q. And for which he paid you rent?

A. Yes, sir.

Q. Was there anything unusual in your making that offer for future freight to Mr. Tugman on the board of trade?

A. Was there anything unusual?

Q. Yes.

A. No, sir.

Q. Was it in the ordinary course of your business acting as agent for the company?

A. Why, certainly; it was our business to get all the freight and revenue that we could.

On cross-examination the witness testified that he was no longer connected with the Erie & Pacific Despatch; that he left the service of the New York, Lake Erie & Western railway two years ago last November.

On redirect examination he testified as follows:

Q. Did you make out the bills of lading yourself for this property shipped under the Tugman contract?

A. They were made out in my office.

Q. Did you sign them yourself?
A. Yes, sir; they were through bills—through from Chicago to Liverpool via the National Steamship Company line.
Q. When those goods shipped under those bills of lading reached New York did not the National Steamship Company pay the inland freight?

DEFENDANT'S COUNSEL: He was not there and cannot tell.

Q. Did not they pay the freight to the Erie & Pacific Despatch?
A. When through bills of lading were issued by any steam-
76 ship line the steamship line receiving that property pays the inland freight.
Q. Didn't they in this case?
A. Yes, sir.

(By defendant's counsel:)

Q. How do you know?
A. If the property was delivered to them it must have been paid.

Defendant's counsel moved to strike out the answers to the questions: "Did they not pay the freight to the Erie & Pacific Despatch?" and "Didn't they in this case?" because, as shown by the answers and by the answer to the question last put by defendant's counsel, they are conclusions and not within the witness' knowledge, and are immaterial, incompetent, irrelevant, and insufficient, and to strike out the answer to defendant's counsel's question as a conclusion and incompetent and insufficient to prove receipt of goods or payment of freight.
The court denied the motions.
To which rulings of the court the defendant then and there duly excepted.

(By plaintiff's counsel:)

Q. Was not the property delivered to the National Steamship Company?
A. The National Steamship Company's bills of lading were issued for this property, and it was obliged to go by the National Steamship Company's line. All insurance policies are taken out in that way. When bills of lading are issued by a particular line they have to go that way. They cannot go any other way.

77 Defendant's counsel objected to the answer.
The court overruled the objection.
To which ruling the defendant then and there duly excepted.

(By plaintiff's counsel:)

Q. Look at these papers I showed you before and say whether or not the goods were actually received. Do these papers indicate anything to you in respect to this freight?
A. They are billed and consigned "via National Steamship Co."
Q. Look at the marks and say whether they indicate the payment of the inland freight by the National Steamship Company.

A. Yes, sir; they are paid and stamped.

(By the COURT:) What is the stamp?

A. Erie Railway Company, paid February, 1875. Pier 30, North river. That is a stamp on the back of the paper.

Q. A stamp used by the Erie Railway Company?

A. Yes, sir.

Defendant's counsel moved to strike out the answers to each of the four preceding questions as not within witness' knowledge and are conclusions because the papers are not proved and because the answers are incompetent, immaterial, irrelevant, and insufficient.

The court allowed the answers to stand.

To which rulings of the court the defendant then and there duly excepted.

Defendant's counsel showing witness a paper—

Q. Do you know what that paper is that I now show you?

78 A. I only know what it reads.

Q. Do you know the handwriting?

A. No, sir.

Q. You don't know anything about it more than that?

A. No, sir; I don't remember anything about it.

(By plaintiff's counsel:)

Q. You had a memorandum there in which you had down the names of people. Were those people's goods shipped under the contract made by you with Mr. Tugman?

A. Yes, sir.

Q. Under the Tugman contract?

A. Yes, sir.

(By DEFENDANT'S COUNSEL:) With regard to the shipment of these goods, I suppose you know nothing about the actual shipment. You issued those bills directly to the people themselves?

A. Yes, sir.

Q. But the actual shipment you yourself know nothing personally about?

A. We received and filled the orders.

Q. But you yourself personally know nothing about the shipment?

A. We received the orders and issued bills of lading to the proper persons.

The plaintiff then rested.

The defendant's counsel then asked the court to instruct the jury to find a verdict in favor of the defendant, upon the ground that there is no evidence to sustain plaintiff's cause of action, and called attention to the non-production of the bills of lading, which would be the best evidence of the alleged contract.

The court denied the motion.

79 To which ruling and decision the defendant then and there duly excepted.

And, the defendant not offering any testimony in its behalf, the court thereupon directed the jury to find a verdict in favor of the

plaintiff in the sum of $4,084, with interest thereon from February, 1875.

To which instruction and direction of the court to find a verdict and to the amount of such verdict the defendant then and there duly excepted.

And, inasmuch as the said several matters do not appear by the record, the defendant's counsel requested the judge of said court to allow and sign this bill of exceptions, and the said judge did, in pursuance of the said request and of the statute in such case made and provided, so allow and sign this bill of exceptions containing in substance the whole of the testimony and evidence in said action and of the proceedings therein at and during the aforesaid term of the court, to wit, the May term of the said court, A. D. 1888.

(Signed) E. HENRY LACOMBE. [SEAL.]

Endorsed: Case and exceptions. Filed May 8, 1888.

80 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Charles H. Tugman, plaintiff, and The National Steamship Company, Limited, defendant, a manifest error hath happened, to the great damage of the said The National Steamship Company (Limited), as is said and by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Samuel F. Miller, associate and
81 acting chief justice of the said Supreme Court of the United States, the 22d day of June, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

[L. S.] B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States for the Eastern District of New York.

Endorsed: Writ of error. Filed June 22, 1888.

82 Know all men by these presents that the National Steamship Company (Limited), a corporation created and existing

by and under the laws of Great Britain; Edward J. Berwind, of No. 55 Broadway, New York city, coal merchant, and David Bingham, of No. 121 Produce Exchange, New York city, grain merchant, are held and firmly bound unto Charles H. Tugman in the penal sum of sixteen thousand dollars, lawful money of the United States of America, to be paid to the said Charles H. Tugman, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the fifth day of July, one thousand eight hundred and eighty-eight.

Whereas on the twenty-second day of June, A. D. 1888, in an action pending in the circuit court of the United States for the eastern district of New York, wherein the above-named Charles H. Tugman is plaintiff and the above The National Steamship Company, Limited, is defendant, judgment was rendered in favor of the said Charles H. Tugman and against the said The National Steamship Company, Limited, for the sum of $7,549 $\frac{5}{100}$ damages and costs;

And whereas the said The National Steamship Company, Limited, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the aforesaid action:

83 Now, the condition of the above obligation is such that if the said The National Steamship Company, Limited, shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE NATIONAL STEAMSHIP CO., L'D, [SEAL.]
Per F. W. J. HURST, *Attorney-in-Fact.* [SEAL.]
EDWARD J. BERWIND.
DAVID BINGHAM. [SEAL.]

Sealed and delivered in presence of—
ADAM GOS.

STATE OF NEW YORK, }
Southern District of New York, } *ss:*

Edward J. Berwind, being duly sworn, on his oath says that he is one of the sureties named in and who executed the foregoing bond; that he is a resident and householder within the State of New York, and is worth the sum of thirty-two thousand dollars over and above all his debts and liabilities and property exempt by law from execution.

EDWARD J. BERWIND.

Sworn to this July 5th, A. D. 1888, before me—

ADAM GOS,
Notary Public, Kings Co., N. Y.

Cert. filed N. Y. Co.

84 STATE OF NEW YORK, } ss:
Southern District of New York, }

David Bingham, being duly sworn, on his oath says that he is one of the sureties named in and who executed the foregoing bond; that he is a resident and freeholder within the State of New Jersey, and worth the sum of thirty-two thousand dollars over and above all his debts and liabilities and property exempt by law from execution.

DAVID BINGHAM.

Sworn to this July 5, A. D. 1888, before me—

ADAM GOS,
Notary Public, — Co., N. Y.

Cert. filed N. Y. Co.

STATE OF NEW YORK, } ss:
Southern District of New York, }

On the 5th day of July, A. D. 1888, before me personally appeared Edward J. Berwind and David Bingham, to me known to be the same individuals described in and who executed the foregoing bond, who severally acknowledged that they executed the same.

And on the same day before me personally appeared Francis W. J. Hurst, to me known to be the attorney-in-fact of the National Steamship Company, Limited, the corporation described in
85 and who executed the within bond by its said attorney, who acknowledged to me that he executed the same under and by virtue of a power of attorney to him duly executed by the said The National Steamship Company, Limited.

ADAM GOS,
Notary Public, Kings Co., N. Y.

Cert. filed N. Y. Co.

Endorsed: Bond for damages and costs. Filed July 14, 1888. Approved. E. Henry Lacombe.

86 UNITED STATES OF AMERICA, } ss:
Eastern District of New York, }

I, B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 85, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Charles H. Tugman *vs.* The National Steamship Company, Limited, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this 15th day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT, *Clerk.*

87 The United States of America to Charles H. Tugman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to the writ of error filed in the office of the clerk of the circuit court of the United States for the eastern district of New York, wherein The National Steamship Company, Limited, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. Henry Lacombe, judge of the circuit court of the United States for the second judicial circuit, [SEAL.] the sixth day of July, in the year of our Lord one thousand eight hundred and eighty-eight.

E. H. LACOMBE.

88 [Endorsed:] Supreme Court of the United States. The National Steamship Company, Limited, plaintiff in error, *versus* Charles H. Tugman, defendant in error. Citation. Ret'ble 2d Monday of October, A. D. 1888. John Chetwood, att'y pl'ff in error, 145 Broadway, N. Y. city. Service of a copy of within citation on this 12th day of July, 1888, is hereby admitted. Vanderpoel, Green & Cuming, att'y for Tugman.

STATE OF NEW YORK, *District of New York.* } *ss.*:

On this twenty-first day of September, A. D. 1888, before me, the subscriber, personally appeared Adam Gos, to me personally known, who makes oath and says that on the twelfth day of July, A. D. 1888, he served the within citation on Messrs. Vanderpoel, Green and Cuming, to deponent known to be the attorneys of record of Charles H. Tugman, the within-named defendant in error, at their office, No. 2 Wall street, New York city, by delivering a true copy of said citation to and leaving the same with Delos McCurdy, Esq., to deponent known to be one of the said attorneys, personally.

ADAM GOS.

Subscribed & sworn to before me the 21st day of September, 1888.

RICHARD P. MORLE,
U. S. Commissioner.

Endorsed on cover: E. New York C. C. U. S. No. 150. The National Steamship Company (Limited), plaintiff in error, *vs.* Charles H. Tugman. Filed October 4, 1888.

FILED.
JAN 8 1892

Supreme Court of the United States.

No. 150.

THE NATIONAL STEAMSHIP COMPANY, LIMITED,
Plaintiff in Error,

vs.

CHARLES H. TUGMAN.

BRIEF.

JOHN CHETWOOD,
Attorney Plaintiff in Error.

Evening Post Job Printing House, New York.

Supreme Court of the United States.

THE NATIONAL STEAMSHIP COMPANY, LIMITED,
Plaintiff in Error,

vs.

CHARLES H. TUGMAN,
Defendant in Error.

No. 150.

This is an action brought by the defendant in error (a citizen of the State of Illinois) against the plaintiff in error (a citizen or subject of Great Britain) to recover the sum of $4,027.24 in gold coin, alleged by defendant in error in his complaint to have been wrongfully and fraudulently collected by plaintiff in error in Liverpool from the consignees of certain goods alleged to have been carried by plaintiff in error for the defendant in error in December, 1874, and January, 1875, and to have been converted by plaintiff in error to its own use (Record, pp. 1, 2).

The action was originally brought in the New York Supreme Court in Kings County. Plaintiff in error alleging in its petition the citizenship of defendant in error and its own alienage, moved in the State Court for the removal of the action into the Circuit Court of the

United States for the Eastern District of New York, and tendered a bond under the statute (pp. 3, 4, 5). The defendant in error opposed the motion and the Court denied it and held the cause. Plaintiff in error pleaded the general issue and the Court tried the cause and rendered judgment in favor of defendant in error. Plaintiff in error then appealed to the General Term of the New York Supreme Court. The judgment was there affirmed; an appeal was then taken to the Court of Appeals, and the judgment was there affirmed. The action was then taken by writ of error to this Court, which reversed the judgments of the Court of Appeals and of the New York Supreme Court, with costs, and issued its mandate, remanding the action to the New York Supreme Court with instructions to accept the bond tendered by plaintiff in error in order that such execution and further proceedings may be had in the cause in conformity to the judgment of this Court, as according to right and justice and the Constitution and laws of the United States ought to be had therein (p. 7).

Plaintiff in error thereupon had the costs in the action (including an extra allowance granted by the Judge of the New York Supreme Court after hearing counsel for defendant in error) taxed (p. 20) and judgment entered reversing the several judgments of the New York Supreme Court and of the Court of Appeals with costs, accepting the bond tendered by plaintiff in error for the removal of the action and adjudging that the plaintiff in error recover of the defendant in error the sum of $1,206.33, the amount of its costs as taxed (p. 21).

Defendant in error was insolvent and plaintiff in error held a judgment against him which it had been unable to collect (fol. 36).

Plaintiff in error then entered its appearance in the United States Circuit Court for the Eastern District of New York, and the defendant in error moved the action for trial.

Plaintiff in error then moved, upon the petition and bond made and filed by it, the order of denial, the affidavits of Adam Gos and Charles M. Conyers, the notice of taxation of costs, the affidavit of John Chetwood, the order of allowance, the bill of costs, as taxed, the order of Judge Bartlett, and judgment upon the mandate of this Court, and generally upon all the papers in the action, set forth in the records for a stay of all proceedings on the part of the defendant in error until the payment of the sum of $1,206.33 costs as taxed. The Court ordered that the proceedings be stayed until the payment of the costs in this Court. Defendant in error then tendered plaintiff in error the sum of $108.34 for such costs, which plaintiff in error declined to receive, claiming the sum taxed. The Circuit Judge then refused the stay and the cause went to trial (p. 21).

Defendant in error produced and examined certain witnesses, and counsel for plaintiff in error relying upon the imperfect and insufficient character of the testimony, and upon the errors of the Court, offered no testimony. And a verdict, by direction of the Court, was rendered against plaintiff in error for $4,084, with interest from February, 1875, amounting in all to $7,549.59.

Plaintiff specifies the following errors, on the part of the defendant in error, relied upon by plaintiff in error in this cause:

1st. The refusal of the Court to stay proceedings on the part of defendant in error until the payment of the costs in the action as taxed.

2nd. The refusal of the Court to allow the question "Did you always pay them?" (p. 23).

3d. The refusal of the Court to allow the question "Is there a judgment now pending in favor of "defendant against you?" (p. 23).

4th. The refusal of the Court to allow the question "What do you say then, I so understood "you to say?" (fol. 55).

5th. The refusal of the Court to strike out the testimony of the witness Tugman, that the plaintiff in error was paid the extra freight (fol. 59).

6th. The admission by the Court as evidence of a paper purporting to be a copy of an affidavit of F. W. J. Hurst, made in this action (p. 33).

7th. The attempt made to prove the copy affidavit of F. W. J. Hurst by examination of the attorney of plaintiff in error (fol. 65), and of the attorney's clerk (fol. 69).

8th. The refusal of the Court to strike out the answer to the question "Did they not pay the "freight to the Erie and Pacific Dispatch?" and to the question "Didn't they in this case?" and to the question "How do you know?" (fol. 76).

9th. The objection overruled by the Court to the answer to the question "Was not the property "delivered to the National Steamship Company?" (fol. 77).

10th. The refusal of the Court to strike out the answer to the following questions: "Look at "those papers I showed you before and say "whether or not the goods were actually re-"ceived?" Do these papers indicate anything to "you in respect to this freight?" Look at the "marks and say whether they indicate the pay-"ment of the inland freight by the National "Steamship Company?" "What is the stamp, "a stamp used by the Erie Railway Company?" (*fol.* 77).

11th. The denial by the Court of the motion to instruct the jury to find a verdict in favor of plaintiff in error.

12th. The direction of the Court to find a verdict in favor of defendant in error.

13th. The amount of the judgment directed for the defendant in error.

POINTS.

I.

On the reversal by this Court, plaintiff in error was entitled to the costs in the State Court not specified in the mandate.

Supreme Court Rule 24, Subd. 3.

In fact, by the mandate plaintiff in error was given those costs. In such case the Court below enters judgment for its own costs, as well as for those in this Court.

Clerke *vs.* Harwood, 3 Dallas, 342.
McKnight *vs.* Craig, Admr., 6 Cranch, 183.
Riddle *vs.* Mandeville, 6 Cranch, 86.

The costs in this Court were noted in the mandate to inform the Clerk of the Court below their amount

for final taxation. The Rule 24, Sub. 3, of this Court shows the authority which the Clerk of the Court below has to tax costs, and these to be of the Court below: "In cases of reversal of any judgment "or decree in this Court, costs shall be awarded to "the plaintiff in error or appellant unless otherwise "ordered by this Court. *The costs of the transcript "of the record from the Court below shall be a part "of such costs, and be taxable in that Court as "costs in the case.*"

If the previous proceedings in this Court are treated as proceedings in this action, and the order for payment of costs as an interlocutory order, the Court below had plainly the power to stay proceedings until the party pressing them paid the costs already accrued.

Foley *vs.* Rathbone, 12 Hun, 591.
Kentish *vs.* Tatham, 6 Hill, 373.

Objection that costs of former motion unpaid is addressed to the discretion of the Court, and will usually prevail when it is made to appear that the party is insolvent.

Adams *vs.* Rush, 2 Abb. U. S., 116.

But case authority is unnecessary. The Code of Civil Procedure, in Sec. 779, provides that "where costs of a motion or any other sum of

" money directed by an order to be paid are not paid
" * * * within ten days after service of a copy of
" the order * * * all proceedings on the part of
" the party required to pay the same, except to review
" or vacate the order, are stayed without further
" direction of the Court until the payment
" thereof." * * *

The order was served on November 8, 1884 (pp. 15, 16).

If the order of reversal be treated as a judgment authorities are ample that where judgmeut has been entered against a party he must pay the costs before he can bring or pursue another action, and a motion to stay will be entertained at any time, either when new action brought by the original party or his assignee, or whether in the same or a different court.

Jackson *vs.* Carpenter, 3 Cowen, 22.
Jackson *vs.* Miller, *Ibid.*, 57.
Perkins *vs.* Hinman, 19 Johnson, 237.
Griffin *vs.* Round Lake Assn., 26 Hun, 314.
Barrow *vs.* Speis, 73 N. Y., 133.

Defendant in error has never appealed from these costs as taxed, his only attempt to question them was by his resistance to the motion for a stay until they were paid.

" So long as judgment for costs is pronounced
" and is not sought to be reviewed on appeal
" or otherwise in a direct proceeding for that pur-
" pose, and is not manifestly void upon its face,

"it ought to be held conclusive on the parties and "deemed to be right and not open to a consideration "of the equities which entered in the judgment "itself."

McMahon *vs.* Mut. Ben. L. Ins. Co. (Supreme Ct.), 12 Abb. P. R., 30.

McMahon *vs.* Mut. Ben. L. Ins. Co. (Superior Ct.), 3 Bosw., 644.

Hunt *vs.* Inhabitants of Hanover, 8 Metcalfe, 343.

II.

On the 2d, 3d and 4th exceptions defendant in error was improperly protected from proper questions in cross-examination. He was his own witness, and plaintiff in error was entitled to learn from him what his relations and indebtedness were to Carhart, his only other witness. These questions did not require to be based on any special allegations in the answer, but were competent as general questions upon and about character and interest.

III.

On the 5th exception there was an error in allowing the answer to the question to stand. The proof discloses clearly afterwards that it was a presumption of the defendant in error that he had given the

difference of freight to be collected by a Mr. De Bow, a president of the Erie and Pacific Dispatch, and witness says De Bow said they had received it. Witness never went to New York; never saw or had an interview with Mr. Hurst or any other representative of plaintiff in error, never saw De Bow (fol. 60). It is nothing but hearsay.

And, moreover, it is a material point for witness to prove a demand made by him upon plaintiff in error for the money alleged to have been collected before suit brought.

IV.

The errors excepted to in the 6th and 7th exceptions are grave and fatal.

They introduce what purports to be a copy of an affidavit made in the action, but does not prove it to be a copy.

It is not proven that it was an examined copy or that it was served by the attorney of the plaintiff in error or that it came into the possession of the defendant in error from the attorney of the plaintiff in error.

And the witness only testifies that he believes it was the paper or a copy of the paper served on his attorney (fol. 61), and makes it ten years later in date than the paper in the record (fols. 60, 72). The witness' testimony that there was a motion before the Referee is contradicted by the attorney of plaintiff in error. The motion to amend the answer was made before Mr. Justice Pratt, of the N. Y. Supreme Court, and the affidavits read in the motion are filed with the Clerk of the Court "When any order on a non-enumerated motion is entered, all the papers * * * shall be filed with the Clerk" (Rule 3,

Courts of Record). The original was not produced, and no notice to produce was given.

There was no attempt to prove the paper as a part of a judicial proceeding, by the attestation of the Clerk, the seal of the Court, and the certificate of the Judge, according to the requirements of Sec. 905 of the U. S. Revised Statutes. Neither was there an attempt made to prove the paper under Sec. 933 of the Code of Civil Procedure. By that section of the Code "a copy of a paper filed, kept, entered or recorded pursuant to law * * * with the Clerk of a Court of the State, * * * is evidence as if the original was produced. But to entitle it to be used in evidence it must be certified by the Clerk of the Court under his hand and the seal of the Court."

The matter of the affidavit is not such as the affiant could testify to. He can of his own knowledge know nothing of the action of his principals in Liverpool. He did not himself give the rate in New York.

The attempt to prove the copy of the affidavit by plaintiff's attorney and his clerk was seeking evidence in a forbidden way. The Code of Civil Procedure (Sec. 835) says: "An attorney or "counsellor at law shall not be allowed to dis- "close a communication made by his client to him "or his advice given thereon in the course of his "employment."

V.

Under the 8th exception plaintiff in error was entitled to have the answers to the three questions struck out, because the answers were conclusions.

The facts were not within the witness' knowledge, and were incompetent and insufficient to prove the receipt of the goods or payment of the freight.

VI.

Under the 9th exception plaintiff in error was entitled to have the witness' answer stricken out, because it shows no actual knowledge on part of the witness. He details something that might or might not have occurred, and from that reaches a conclusion.

VII.

Under the 10th exception plaintiff in error was entitled to have the answer stricken out, because the facts were not within the witness' knowledge, because the answers are conclusions, and because the papers are not proved.

VIII.

On the 11th exception the Court committed an error in denying plaintiff in error's motion for judgment. The general lack of evidence is shown by the whole case and the preceding exceptions.

Guesses and conclusions are not evidence; the testimony of defendant and of Carhart, neither of whom was present either in New York or Liverpool, cannot be available to prove the case even with the help of the affidavit, but that we confidently submit was improperly received.

IX.

There is no satisfactory or sufficient judgment as to the amount directed for the defendant in error, and such amount differs from the amount claimed in the complaint. Defendant in error, by his complaint, alleges the amount collected by plaintiff in error to be $4,027.24 (fol. 3). The Court directed a verdict for $4,084 (fol. 79). The time of the alleged collection of the freight was in no way proved, yet the Court directed the jury to compute interest from February, 1875 (fol. 79). The defendant in error's testimony, on which the direction depends, was, "that he shipped, or caused to be shipped, over the National Line, the whole lot—*over* a thousand tons of freight" (fol. 51). "That the average difference "of advance on his shipment was 19½ cents gold "per hundred pounds" (fol. 52); "that this would "make a difference of about $4,084" (fol. 52).

X.

The judgment of the Court below should be reversed, and that Court directed to stay all proceedings in this action on the part of the defendant in error until the payment by him of the costs as taxed.

JOHN CHETWOOD,
Attorney for Plaintiff in Error.

FILED,
JAN 11 1892

SUPREME COURT OF THE UNITED STATES

October Term, 1891.

No. 150.

THE NATIONAL STEAMSHIP COMPANY
(LIMITED),
Plaintiff in Error,

vs.

CHARLES H. TUGMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

Brief for Charles H. Tugman.

VANDERPOEL, GREEN & CUMING,
Attorneys for Charles H. Tugman.

DELOS McCURDY,
Of Counsel.

DOUGLAS TAYLOR, LAW PRINTER, 8 WARREN STREET, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 150.

THE NATIONAL STEAMSHIP COMPANY (LIMITED),
Plaintiff in Error,

vs.

CHARLES H. TUGMAN.

Brief for Charles H. Tugman.

PRELIMINARY STATEMENT.

The action was originally commenced in the Supreme Court of the State of New Nork in the year 1875.

The steamship company duly presented to the State Court a petition and bond, as required by law, to remove the cause into the Circuit Court for the Eastern District of New York. The State Court, however, refused to accept the bond and proceeded with the cause, and after a hearing on the merits gave Tugman a judgment against the Steamship company for $4,324.14. This judgment was affirmed by the Court of Appeals of the State.

A writ of error then issued in the Supreme Court of the

United States, and this Court reversed the judgments of the Court of Appeals of New York and of the Supreme Court of New York, and remanded the cause, with directions that the latter Court accept the bond tendered by the plaintiff in error for the removal of the cause to the Circuit Court of the United States for the Eastern District of that State "and proceed no further in the cause" (Steamship Co. *vs*, Tugman, 106 U. S. Supreme Court R., 118–123).

The Supreme Court of the United States also held that immediately upon the filing of the petition and bond for removal the jurisdiction of the State Court absolutely ceased, and that of the Circuit Court of the United States attached, and that, therefore, every order thereafter made by the State Court was *coram non judice* (*ibid*). By its mandate the Supreme Court of the United States also ordered that the plaintiff in error recover against the defendant in error $108,34 for its costs in that Court and have execution therefor.

On the receipt of the mandate the Supreme Court of New York proceeded to reverse the judgment which had theretofore been entered by that Court in favor of the plaintiff therein " with costs to the defendant to be taxed," and ordered judgment accordingly. Thereafter the Supreme Court of New York, on motion of the defendant and against the objection of the plaintiff, granted to the defendant, in addition to the taxable costs, an extra allowance of $500, and on November 8th, 1884, entered up its judgment in favor of defendant therein against the plaintiff therein, for taxable costs and extra allowance amounting in all to the sum of $1,206.30. These costs the defendant in error refused to pay; and thereupon plaintiff in error applied for a stay of all further proceedings in the Circuit Court of the United States until the defendant

in error pay the costs for which judgment was awarded against him in the State Court in November, 1884.

The application for the stay of proceedings was made upon affidavits before Judge Benedict in March, 1887, and argued at length.

On the 24th of March, 1887, Judge Benedict rendered his decision denying the application for a stay of proceedings until the costs awarded by the State Court were paid, on the ground, among others, that the Court ought not, "in the exercise of a proper discretion, grant a stay;" and also holding that "The costs of the Supreme Court "of the United States, which the Supreme Court did "award, are different, and these the plaintiff has offered "to pay. On such payment being made an order will be "made denying the stay asked for by the defendant." Judge Benedict's opinion is reported in full in the Federal Reporter, Vol. 30, pp. 802–804.

Prior to this application for a stay the cause had been noticed for trial in the United States Circuit Court for the Eastern District of New York, and came up on the calendar for trial before Judge Wheeler at the November Term in 1887. Then and there the application for a stay of trial was made orally and on the same grounds subsequently urged before Judge Benedict. The motion was denied by Judge Wheeler and the cause ordered to trial, but the cause was not reached during that term.

When at length the cause came up for trial before Judge Lacombe at the May Term in 1888, the plaintiff in error renewed his motion for a stay of trial until the costs in the State Court were paid, which motion was denied.

The defendant in error again, and in open court tendered the amount of the costs in the Supreme Court of the United States, which the plaintiff in error refused to receive.

STATEMENT OF THE CASE.

The action was brought upon a contract made between Tugman and the steamship company in October, 1874, by which the latter agreed to carry and safely deliver one thousand tons of merchandise at shipper's option during the months of December, 1874, and January, 1875, at the agreed price therefor of 27s. 6d. per ton in gold.

Tugman shipped or caused to be shipped the requisite amount of merchandise under the contract during the months of December, 1874, and January, 1875, all of which was received and carried by the steamship company.

After the making of the contract the rate of ocean freight advanced in price to such an extent that the aggregate amount of the difference between the contract price and the freight actually collected by the steamship company from the consignees was $4,084.

This difference of $4,084 was actually collected by the steamship company from the consignees and was retained by that company after demand made therefor by Tugman, and the same was by the Company converted to its own use.

It is nowhere denied in evidence that the contract was made, and in the terms stated. It is not denied that the steamship company collected this difference and refused to pay it over to the shipper, to whom concededly it belonged, but continued to hold it notwithstanding the demand made.

In fact, the evidence to sustain the judgment of the Circuit Court is absolutely undisputed, and, therefore, the verdict was properly directed.

CONSIDERATIONS OF LAW.

I.—The first exception is to the refusal of the Circuit Court to order a stay of all proceedings in the action until the costs in the State Court were paid. The plaintiff in error was not entitled as a matter of right to a stay of proceedings until the costs of the State Court were paid.

It is the well-settled rule of law that there is no absolute right in a defendant to demand the judgment of the Court forbidding the prosecution of a second suit for the same cause of action until the costs of a former suit are paid.

It is an equity depending upon the circumstances of each particular case and is addressed to the sound discretion of the Court.

McMahon *vs.* Life Ins. Co., 13 Abb. Pr. Reps., 30.

Dare *vs.* Murphy, 12 Civ. Pro. Reps., 388.

Much less is there an absolute right to stay the trial of an action until the costs in *that same action are paid.*

Moreover the judgment of the State Court awarding costs and an extra allowance was without jurisdiction and in defiance of the mandate of this Court which directed the State Court to accept the removal bond "and proceed no further in the cause."

Tugman *vs.* National S.S. Co., 30 Fed. Rep., 802, per Benedict, J.

Steamship Co. *vs.* Tugman, 106 U. S., 118.

II.—The plaintiff in error cannot contend that any question of fact is involved.

At the close of the testimony the defendant moved

for the direction of a verdict, which was denied. The Court then directed a verdict for the plaintiff. Exception was taken by the defendant to the ruling of the Court, but no request was made to submit any question of fact to the jury.

Authority is clear and ample to the effect that when a defendant in a jury trial at the close of the whole evidence moves for the direction of a verdict in his favor which is denied, and followed by the direction of the Court to find a verdict for the plaintiff, and no request is made by the defendant to submit any question of fact to the jury, the defendant is held to have thereby admitted that questions of law only were involved.

Todd *vs.* Todd, 3 Hun, Supreme Ct. R., 298.
Barnes *vs.* Perine, 12 N. Y., 18.
Winchell *vs.* Hicks, 18 N. Y., 558.
O'Neill *vs.* James, 43 N. Y., 85.

The ground on which defendant based its exception to the refusal of the Court to direct a verdict in its favor is utterly untenable. The ground urged was that "the bills of lading would be the best evidence of the alleged contract," and they were not produced.

The contract had already been fully proved without objection to the character of the evidence by which it was established.

In fact, the contract was undisputed.

It was too late to suggest at the close of all the evidence and after the contract was completely proved, that it had not been proved by the very best evidence. Such an objection to be availing must be made to the admission of the evidence at the time it is offered. No such objection was then made. Indeed, the case

was tried upon the theory that precisely that contract was made by the steamship company, but that the company for some unexpressed reason ought not to be held liable to Tugman thereunder.

Moreover, the bills of lading if produced would not have been the best, or any evidence whatever, of the contract made in October, 1874, between Tugman and the steamship company for future freight to be shipped in December and January following. At best the bills of lading would be but evidence of a shipment of merchandise, and would perhaps be conclusive evidence of the quantity and quality of such merchandise, but as to these there was no dispute.

III.—The defendant's exceptions to the rulings of the Court admitting and rejecting testimony are none of them material or well taken.

1. The first of these arose on the cross-examination of plaintiff and is found on page 23 of the Record. He had testified on cross-examination that prior to 1874 he had lived in New York and had shipped butter, cheese and bacon on the defendant's line of steamships. He was then asked the

"Q. Did you always pay them?"

The question was objected to as immaterial and incompetent.

The defendant's counsel then offered to prove that the plaintiffs went from New York insolvent and a judgment debtor to defendant; that he established himself in Chicago, and in combination with Carhart the scheme was concocted by which a man of straw should be given apparently a contract with this defendant for a future shipment.

The Court said: "That tends to make out a

species of conspiracy which I think should be pleaded in order to be proved. You cannot, it seems to me, prove such a complicated conspiracy under a general denial."

The Court excluded the testimony as not within the issues raised by the pleadings; to which ruling the defendant excepted.

It is the well established rule in all courts that under a general denial of the plaintiff's complaint the defendant can be allowed to prove only such facts as tend to controvert whatever plaintiff is compelled to prove in order to establish his case.

And a defendant cannot give evidence of any defense of new matter not set up in his answer.

Diefendorf *vs.* Gage, 7 Barb., 18.
Kelsey *vs.* Western, 2 N. Y., 501.
Baker *vs.* Bailey, 16 Barb., 54.
Foy *vs.* Grimstead, 10 Barb., 321.
Field *vs.* Mayor, 6 N. Y., 179.
Sandford *vs.* Travers, 40 N. Y., 140.
Wright *vs.* Delafield, 25 N. Y., 266.

1. The testimony offered did not tend to prove that no contract was made with plaintiff.

On the contrary the offer was to show that when the contract was given to plaintiff he was "a man of straw." It was wholly immaterial whether he was then a "man of straw" or of flesh and blood.

2. The defendant's counsel then returned to the other branch of the offer and asked the

"Q. Is there a judgment now pending in favor of the defendant against you?"

This question was objected to as immaterial and incompetent.

The Court sustained the objection on the ground that the proof offered was not within the issues raised by the pleadings.

This ruling was correct.

The defense of a former judgment must be specially pleaded.

The proof offered was also incompetent for the reason that the record of the judgment (if there was a judgment) should have been produced. The record is the only competent evidence of its existence.

IV.—The exceptions at folios 57, 59 and 60 are too trivial to discuss.

V.—The exception taken by defendant's counsel to the introduction in evidence of the affidavit of F. W. J. Hurst is untenable.

The affidavit was the voluntary sworn statement of Hurst as the sole managing agent of the defendant company and related to the matter in controversy between the company and Tugman.

It was an affidavit made in the action to obtain an order to show cause why the answer should not be amended and was served with the order upon the plaintiff's attorney.

It was in the handwriting of a clerk in the office of the defendant's counsel, and his managing clerk swears that he has no doubt that it is a copy of the original affidavit and that it is in the handwriting of one of the clerks in the office of defendant's counsel at that time.

The objections raised to the introduction of this affidavit in evidence were:

First.—That it is a copy not proved.

Second.—That this Court had held the proceedings in the State Court to be utterly invalid, and as this was an affidavit made in the proceeding in State Court it was incompetent as evidence.

The testimony is clear, conclusive and uncontradicted that the copy offered in evidence issued from Mr. Chetwood's office, and that he was the attorney for the defendant company from the commencement of the action.

That the affidavit was drawn in his office and sworn to by Mr. Hurst before Adam Gos, a notary public, and also the managing clerk in Mr. Chetwood's office.

That it was copied by the clerk in the same office, and served upon the plaintiff as the affidavit upon which the order to show cause was obtained. Mr. Gos, who was the notary as well as the managing clerk, swears that it is a copy of the original affidavit.

The production of the original was demanded from defendant's attorney, who declined to produce it.

As a copy, it was duly proved, and it was properly admitted in evidence as a voluntary admission of the defendant.

That Hurst was the sole managing agent of the defendant company sufficiently appears and is undisputed.

As such he verified the petition for removal and the answer in the case.

It was not questioned that he had authority to act in this matter and to bind the company by his admissions.

No objection was made to his declarations on the ground that they were not binding upon the company.

His declarations, therefore, fall clearly within the rule that whatever the agent does or says in reference to the business in which he is at the time employed and within the scope of his authority, is done or said by the principal, and may be proved as if the evidence applied personally to the principal.

Am. Fur Co. *vs.* U. S., 2 Pet., 358.
Xenia Bk. *vs.* Stewart, 114 U. S., 228.

5. The objections at folios 74, 76 and 77 are frivolous.

6. The judgment is right and should be affirmed.

DELOS McCURDY,
Of Counsel.